No. 86-924

IN THE

Supreme Court of the United States

October Term, 1986

NETTIE JORDAN,
Petitioner,

v.

JOHN SCHROEDER, as Personal Representative for the ESTATE OF HERMAN SCHROEDER, M.D.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF WASHINGTON

I. RESPONSE TO QUESTIONS PRESENTED FOR REVIEW

Respondent respectfully submits that there are two questions presented by the Petition for Writ of Certiorari:

1. Whether the petition should be dismissed because it was not filed within ninety days after the Washington Supreme Court entered the order which fully determined the rights of the parties and which was not subject to further review by any Washington court?

2. Whether a civil plaintiff in a medical malpractice action involving a purely private dispute between two private parties has a Constitutional right to the effective assistance of hired counsel?

II. STATEMENT OF THE CASE

A. Factual Background.

This medical malpractice action was commenced in 1977 against the estate of Dr. Herman Schroeder, Respondent. Petitioner, Mrs. Jordan, claimed that Dr. Schroeder was negligent in and failed to obtain her informed consent to both his administration of estrogen (Theelin) injections from 1967 to 1971 and the removal of her fallopian tubes and ovaries during her hysterectomy in February 1974.

Mrs. Jordan first saw Dr. Schroeder on April 6, 1967. He diagnosed large uterine fibroids, masses composed mainly of fibrous or fully developed connective tissue. (Trial Exhibit 2; Report of Proceedings ("RP") 212:25-213:6.) His records indicate he recommended a dilatation and curettage, abdominal hysterectomy and Theelin injections. (RP 217:15-18; 220:8-12; Trial Exhibit 2.)

Mrs. Jordan continued to see Dr. Schroeder from May 26, 1967 to November 29, 1971, and received Theelin injections approximately two times per month for treatment of her documented, chronically low estrogen levels. (RP 276:16-277:6; 337:7-15; 355:16-20.) During this time, Dr. Schroeder's records reflect that he continued to recommend a hysterectomy which Petitioner steadfastly refused. He saw her periodically throughout 1972 and 1973, and his records note that he persisted in his recommendation of a hysterectomy. (RP 218:6-219:8.)

Mrs. Jordan presented to the emergency room on February 3, 1974 with acute uterine hemorrhage from her fibroids. She was treated conservatively and discharged two days later. (Trial Exhibit 4.) On February 18, 1974, she was readmitted with another acute episode of uterine hemorrhage. This time, she agreed to have a hysterectomy. Prior to this procedure, she signed a medical/surgical request and consent form. This form authorized the attending physician to administer surgical

treatment and to do "any other therapeutic procedures that in [his] judgment may be deemed as necessary for the diagnosis and treatment of the patient's condition." (Trial Exhibit 4.)

The hysterectomy was performed on February 21, 1974. During the surgery it became apparent that the fallopian tubes and ovaries would have to be removed because they were "densely engulfed by fibroids." (Trial Exhibit 4.) Had the ovaries not been removed, the circulation of blood to the ovaries would have been so distorted that there would not have been a good, functioning ovary remaining. (Trial Exhibit 4.)

B. Procedural Background.

Trial commenced on August 10, 1984. Asserting the protection of the Deadman's Statute, RCW 5.60.030, Respondent brought a motion *in limine* to exclude testimony by the Jordans regarding any transactions or conversations with the decedent, Dr. Schroeder. (Defendant's Clerk's Papers ("CP") 48-57.) This motion was granted. (RP 23:8-24:9.) The court also granted Petitioner's motion for an explanatory instruction and instructed the jury that the Jordans would not be able to testify about transactions with the deceased and that the jury should draw no inferences either way from the lack of such testimony. (CP 24.)

At trial, Petitioner's counsel called numerous witnesses: the Jordans, three of Mrs. Jordan's treating physicians — Dr. Norman Brown, Dr. Alfred Magar and Dr. Rodney Cook — and two independent experts — Dr. Kenneth Niswander and Dr. Charles Goodner. Respondent, in turn, called Dr. Schroeder's office nurse, the executor of his estate, and three independent experts — Dr. Raymond Clark, Dr. Charles Stipp, and Dr. Edwin MacCamy.

On August 17, 1984, the case was submitted to the jury. After deliberating approximately four hours, the jury returned its verdict for Respondent. No post-trial motions were made. Judgment on the verdict was entered on August 31, 1984.

Petitioner then filed a notice of appeal and retained new counsel. The only issue presented to the Washington appellate courts was whether Respondent should be put to the burden, expense and inconvenience of a new trial because Petitioner, unhappy with the result and with the counsel she selected and retained, claimed ineffective assistance of counsel.

On appeal, Petitioner asserted several instances of alleged ineffective assistance of counsel. For example, Petitioner claimed that trial counsel should have excepted to the jury instructions. Yet, she did not urge that any instructions were erroneous and cited no authority indicating that an exception would be well taken. She urged that Respondent waived the Deadman's Statute, RCW 5.60.030, and that her trial counsel failed to object to the admission of such evidence. See discussion *infra* at 14-15. She further contended that portions of the medical records were inadmissible, but did not point to a single entry which should have been excised.

Petitioner also criticized her trial counsel's reference to her as "hypertense", when he actually said she had "hypertension" (high blood pressure) which was part of her claimed damages. (RP 46:2-12; 79:7-12.) She further contended that her trial counsel failed to provide copies of all her medical records to the expert witnesses. Yet, the selection of materials to be provided to an expert is a matter of trial tactics and attorney work product. *See Sporck v. Piel*, 759 F.2d 312 (3rd Cir. 1985). In short, Petitioner alleged nothing more than her appellate counsel's disagreement with her trial counsel's technique and trial tactics.

Respondent brought a motion on the merits in the Washington Court of Appeals. Pursuant to the Washington Rules of Appellate Procedure ("RAP"), Rule 18.14, the Court Commissioner dismissed the appeal as "clearly without merit", and ordered that the judgment of the trial court is affirmed. Petitioner then brought a motion to modify the Commissioner's Ruling. RAP 17.7; RAP 18.14(i). A panel of the judges of the Washington Court of Appeals denied the motion to modify. Petitioner then sought discretionary review by the Washington Supreme Court. RAP 13.3-.4. By order dated May 6, 1986, a panel of five justices of the Washington Supreme Court refused to accept review.

III. REASONS FOR DENYING THE WRIT

Respondent respectfully submits that the Petition for Writ of Certiorari should be denied for want of jurisdiction. The petition was not filed within the time provided by law. 28 U.S.C. § 2101(c); Rule 28.2, Rules of Supreme Court. On May 6, 1986, the Washington Supreme Court entered an order fully determining the rights of the parties and not subject to further review by any state court. Petitioner failed to file her petition within ninety days of this date.

The petition should also be denied because this is not a case with special and important reasons for granting certiorari. The Commissioner of the Washington Court of Appeals did not decide an important question of federal law which should be settled by this Court nor did he decide a federal question in a way in conflict with applicable decisions of this Court or a federal court of appeals. *See* Rule 17.1(b), 17.1(c), Rules of the Supreme Court.

This case involves a private dispute between private parties sounding in tort. This civil action involved neither state-instituted proceedings subject to close scrutiny nor any deprivation of Petitioner's life, liberty or property by way of application of any state or federal statute.

A. ***The Petition Is Jurisdictionally Out of Time — It Was Filed Over Ninety Days After the Final Order of the Washington Supreme Court Which Was Not Subject to Further Review.***

The following chronology demonstrates that the petition was not filed within the time allowed by 28 U.S.C. § 2101(c):

August 31, 1984	Judgment entered on jury verdict — Superior Court of Washington.
January 13, 1986	Commissioner's Ruling ordering that "the judgment of the trial court is affirmed" — Washington Court of Appeals.
February 27, 1986	Order Denying Motion to Modify the ruling — Washington Court of Appeals.
May 6, 1986	Order Denying Petition for Discretionary Review — Washington Supreme Court.
May 15, 1986	Mandate signed notifying the Superior Court of the January 13, 1986 ruling dismissing the appeal — Washington Court of Appeals.
August 4, 1986	Last day to file Petition for Writ of Certiorari (ninety days from May 6, 1986).
August 13, 1986	Petition for Writ of Certiorari mailed.
August 20, 1986	U.S. Supreme Court Clerk returns the petition as out of time.
November 25, 1986	Motion to Direct Clerk to File Petition for Writ of Certiorari to the Washington Court of Appeals.

Under 28 U.S.C. § 2101(c) and Rule 20.4, Rules of Supreme Court, the petition was not timely filed. 28 U.S.C. § 2101(c) provides, in part:

> Any other . . . writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. . . .

Rule 20.4, Rules of Supreme Court, further provides that the time for "filing a petition for writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered, *and not from the date of issuance of the mandate* (or its equivalent under local practice)." (Emphasis added.)

This Court has held that the judgment, decree or order of a state appellate court is final and subject to review

> when it ended the litigation by fully determining the rights of the parties, so that nothing remained to be done by the lower court except the ministerial act of entering the judgment which the appellate court had directed. . . .
>
> . . .
>
> For the purpose of the finality which is prerequisite to a review in this Court, *the test is not whether under local rules of practice the judgment is denominated final . . ., but rather whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that adjudication is not subject to further review by a state court.* . . . Where the order or judgment is final in that sense, the time for applying to this Court runs from the date of the appellate court's order . . .

Department of Banking v. Pink, 317 U.S. 264, 267-68 (1942) (emphasis added, citations omitted).

On May 6, 1986, the Washington Supreme Court denied Petitioner's application for discretionary review. This order was not subject to further review by that court or any other state court. Therefore, the time for applying to this Court for review began running on May 6, 1986. *Id.* The Petition for Writ of Certiorari filed on August 13, 1986 was not timely. That petition should, therefore, be denied.

Unlike *Puget Sound Power & Light Co. v. King County*, 264 U.S. 22 24-25 (1924), this case is governed by the Washington Rules of Appellate Procedure. RAP 1.1(g) and RAP 18.22. Under current Washington appellate procedure, the trial court judgment is expressly affirmed by the appellate court's opinion and not by the appellate court clerk's subsequently recorded judgment. In *Puget Sound Power & Light*, this Court held, under the law of Washington then in effect, that the time for filing a writ in this Court ran from entry of the judgment of the Washington Supreme Court by the clerk of that court and not from the date of the court's opinion. The then-effective Washington statute expressly required a formal, ministerial entry of the judgment by the clerk. However, that statute has been superseded by RAP 1.1(g) and RAP 18.22.

Under the present Washington appellate procedure and rules, the May 6, 1986 order of the Washington Supreme Court refusing to accept discretionary review of this case was not reviewable. *See generally*, RAP 12.3, 12.4, and 12.5(b). Upon that order, the rights of the parties were fully determined in the Washington appellate courts. No review lies from the denial of discretionary review by the Washington Supreme Court as the mandate issues directly "upon denial of the petition for review." RAP 12.5(b)(3).

The May 6, 1986 order marked the end of this litigation in the Washington courts. The Supreme Court had refused to accept review. The Court of Appeals had already ruled that "it is hereby ORDERED that . . . the judgment of the trial

court is affirmed." *Cf. Puget Sound Power & Light* at 24-25. Nothing remained to be done in the trial court — not even the ministerial act of entering a judgment, because the judgment the trial court had entered on August 31, 1984 had been expressly affirmed.

The subsequent issuance of the mandate merely served as notification of the January 13, 1986 court of appeals decision terminating review. *See State v. Dorosky*, 28 Wn. App. 128, 131, 622 P.2d 402 (1981). RAP 12.5(a) and (b)(3). In Washington, the mandate is not, as urged by Petitioner, a judgment or decree. RAP 12.5(a) defines mandate as "the written notification by the clerk of the appellate court to the trial court and to the parties of an appellate court decision terminating review". Moreover, Rule 20.4 of this Court contemplates this distinction and expressly provides that the time prescribed by 28 U.S.C. § 2101(c) for filing of the petition does not begin to run from the date of the subsequent mandate, but from the date of the judgment or decree sought to be reviewed. That date was May 6, 1986.

For this reason, the Petition for Writ of Certiorari should be denied.[1]

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[1] The petition should also be denied for failure to conform to the Rules of the Supreme Court of the United States. The type size of the appendix does not comply with Rule 33.1(c); the petition has no cover as required by Rule 33.2(b); and the ordering of the Question Presented for Review does not conform to Rule 21.1. Rule 21.2 requires that the petition not be accepted; and pursuant to Rule 33.7 dismissal is an appropriate sanction.

Denial is especially appropriate here where Petitioner not only did not timely file the petition within ninety days, but also did not file her Motion to Direct Clerk to File Petition for Writ of Certiorari until over ninety days after the Supreme Court clerk had originally refused to accept the petition. Further, Petitioner did not seek leave for an extension of time for filing the petition and has not attempted to show good cause for her failures to conform with 28 U.S.C. § 2101(c) or the rules of this Court.

B. *The Washington Court of Appeals Decision Is Not In Conflict With The Decisions of The Federal Courts of Appeal: A Plaintiff In A Medical Malpractice Action Does Not Have A Constitutional Right To The Effective Assistance of Counsel in a Purely Private Dispute With Her Physician.*

Petitioner urges that the Washington Court of Appeals holding that she has no constitutional right to the effective assistance of counsel retained by her to bring a medical malpractice action is in conflict with the Fifth Circuit Court of Appeals decision in *Potashnick v. Port City Construction Company,* 609 F.2d 1101 (5th Cir. 1980). Several federal courts of appeal have considered this issue and have not recognized a constitutional right to the effective assistance of counsel in a private civil action.

In *Potashnick,* the trial court had restricted one of the litigant's access to his attorney during that litigant's testimony. The Fifth Circuit held that this denial of attorney-client communication impinged upon the litigant's right to retain hired counsel. However, the *Potashnick* court also recognized that this right to retain, and freely communicate with, hired counsel "does not require the government to provide lawyers for litigants in civil matters." *Potashnick* at 1118. This Fifth Amendment due process right to retain hired counsel is not impinged where the plaintiff is neither barred from retaining hired counsel nor denied access to such counsel. *Potashnick* at 1118; *Gray v. New England Telephone & Telegraph Company,* 792 F.2d 251, 256-57 (1st Cir. 1986).

The Washington Court of Appeals decision is not in conflict with *Potashnick.* At trial, Petitioner was represented by counsel she had selected and retained. Petitioner has at no time contended that either the trial court or Respondent prevented her from full, free, and open access to and communication with the counsel of her choice. She does not contend that she was in any way prevented from retaining other or additional hired counsel. To the contrary, she freely exercised her right to retain hired counsel.

Petitioner fails to recognize the distinction between the right to retain and communicate with counsel and a right to appointed counsel. *Potashnick* recognized a civil litigant's right to hire and communicate with counsel but expressly rejected a civil litigant's right to an appointed counsel. This rejection of a civil litigant's constitutional entitlement to appointed counsel necessarily rejects any corresponding right of a civil litigant to the effective assistance of counsel. *See Evitts v. Lucey*, ____ U.S. ____, 83 L.Ed.2d 821, 829 n.7, 405 S.Ct. 830, 836 n.7 (1985). The Washington Court of Appeals reached this same conclusion. There is no conflict.

C. ***The Washington Court of Appeals Did Not Decide an Important Question of Federal Law Which Should Be Settled by This Court: There Is No Fifth Amendment Right to Effective Assistance of Counsel for a Civil Litigant in a Purely Private Dispute.***

Petitioner urges that the Constitution guarantees her the right to "retain *competent* civil counsel." *See* Petition at 16. Apparently this means, if she chooses incompetent or ineffective counsel, then the Constitution guarantees her a new trial.[2] The right of a civil plaintiff to retain and communicate with hired counsel does not stretch that far.

The Eleventh Circuit Court of Appeals when faced with a similar argument stated as follows:

> In effect, the plaintiffs assume that they have a protected right to competent representation in their lawsuit. Simply stated, however, "there is no constitutional or statutory right to effective assistance of counsel in a civil

[2] Petitioner cites the Fifth, Seventh and Fourteenth Amendments in her petition. Yet, Petitioner does not addresss or acknowledge the state action requirement necessary for these amendments to apply. It is difficult, if not impossible, to discern how any state action is involved where Petitioner herself selected, retained and freely communciated with the counsel with whom she is now dissatisfied.

> case." *Watson v. Moss*, 619 F.2d 775, 776 (8th Cir. 1982); *see also United States v. White*, 589 F.2d 1283, 1285, n.4 (5th Cir. 1979); *United States v. Rogers*, 534 F.2d 1134, 1135 (5th Cir.) *cert. denied*, 429 U.S. 940, 97 S. Ct. 355, 50 L. Ed. 2d 309 (1976); *In Re Grand Jury Matter*, 682 F.2d 61, 66 (3d Cir. 1982); *Kushner v. Winterthur Swiss Insurance Co.*, 620 F.2d 404, 408 (3d Cir. 1980). The sixth amendment standards for effective counsel in criminal cases do not apply in the civil context. *White*, 589 F.2d at 1285 n. 4; *Rogers*, 534 F.2d at 1135; *Watson*, 619 F.2d at 776; for that reason, "[a] party . . . does not have any right to a new trial in a civil suit because of inadequate counsel, but has as its remedy a suit against the attorney for malpractice." *Watson*, 619 F.2d at 776; See also *Kushner*, 620 F.2d at 408.

Mekdeci By And Through Mekdeci v. Merrell National Laboratories, 711 F.2d 1510, 1522-23 (11th Cir. 1983). *See also Hooks v. Wainwright*, 775 F.2d 1433, 1438 (11th Cir. 1985) (stating that there is no constitutional right to counsel for litigants in civil cases); *Hullom v. Burrows*, 266 F.2d 547 (6th Cir. 1959); *Dilliplaine v. Lehigh Valley Trust Co.*, 457 Pa. 255, 260, 322 A.2d 114, 117-18 (1974) (Manderino, J., concurring); *Johnson v. Rutoskey*, 472 N.E.2d 620 (Ind. App. 2d Dist. 1984); *Maltby v. Cox Construction Co.*, 598 P.2d 336 (Utah 1979), *cert. denied*, 444 U.S. 945 (1979).

In essence, Petitioner claims that she was deprived of her Fifth Amendment due process rights because her trial counsel's claimed ineffectiveness denied her an opportunity to present her case in a meaningful way. Meaningful opportunity to be heard does not necessarily include the right to counsel, even in some criminal proceedings, and does not constitutionally entitle a civil litigant to an attorney in a civil case. *Hooks v. Wainwright*, 775 F.2d 1433, 1438 (11th Cir. 1985). *Accord, Potashnick* at 1118. It follows, therefore, that there is no Fifth Amendment right to effective assistance of counsel in a civil case. *See Watson v. Moss*, 619 F.2d 775

(8th Cir. 1980). For, as this Court has reiterated, "the right to effective assistance of counsel is dependent on the right to counsel." *Evitts v. Lucey*, 83 L.Ed.2d at 829 n.7, 405 S. Ct. at 836 n.7.

The decision of the Washington Court of Appeals did not involve a significant constitutional question which should be settled by this court. The Constitution does not require Respondent to bear the burden, expense and inconvenience of a new trial simply because Petitioner is now dissatisfied with the counsel she selected and retained. Nor does the Constitution require that a civil defendant be responsible for the quality of a civil plaintiff's attorney's representation. Several of the federal courts of appeal have considered the issue and have uniformly and summarily stated that a civil litigant has no constitutional right to counsel, to have counsel appointed, or to the effective assistance of counsel.[3] *E.g., Mekdeci By And Through Mekdeci v. Merrell National Laboratories*, 711 F.2d 1510, 1522-23 (11th Cir. 1983) and the cases cited therein.

The Petition for Writ of Certiorari should therefore be denied.

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[3] Numerous state courts have held, on various non-constitutional grounds, that a defendant should not be put to the expense and burden of relitigating a civil action simply because plaintiff claims ineffective assistance of retained counsel. *In re Marriage of Ford*, 470 N.E.2d 357 (Ind. App. 3rd Dist. 1984); *Jennings v. Stoker*, 652 P.2d 912 (Utah 1982); *King v. Superior Court*, 138 Ariz. 147, 673 P.2d 787 (1983); *Andrea Dumon, Inc. v. Pittway Corp.*, 110 Ill. App. 3d 481, 442 N.E.2d 574 (1982); *Engelbrechten v. Galvononi & Nevi Bros., Inc.*, 60 Misc. 2d 419, 302 N.Y.S.2d 691 (1969); *Wilson v. Sherman*, 461 P.2d 606 (Okla. 1969); *Scheffer v. Chron*, 560 S.W.2d 419 (Tex. App. 1977).

D. ***No Federal Questions Are Involved In Petitioner's Trial Counsel's Alleged Ineffective Representation.***

Petitioner's allegations of alleged ineffective assistance of counsel concern evidentiary matters and issues of trial strategy, planning and technique. See discussion *supra* at p. 4. None of these allegations raise questions of federal or constitutional law.

Petitioner's primary allegation concerns a claimed waiver of the Washington Deadman's Statute, RCW 5.60.030. However, the Deadman's Statute is not waived unless the estate introduces or fails to object to evidence barred by the statute. *O'Connor v. Slater,* 48 Wash. 493, 93 P. 1078 (1908); *In re Estate of Davis,* 23 Wn. App. 384, 385-86, 597 P.2d 404 (1979). At trial in this case, the estate did not introduce, comment on, or fail to object to any evidence barred by this statute.

RCW 5.60.030 only prohibits testimony of interested or adverse parties who "will either gain or lose by the direct legal operation and effect of the judgment." *Adams Marine Serv. v. Fishel,* 42 Wn.2d 555, 562, 257 P.2d 203 (1953). None of the witnesses whose testimony is claimed by Petitioner to have waived the protection of the statute were interested parties. *E.g., May v. Triple C Convalescent Center,* 19 Wn. App. 794, 799, 578 P.2d 541 (1978).

The admission of Respondent's medical records, testimony regarding the contents of those records, and reference to their contents in opening statement did not waive the protection of the statute. The Deadman's Statute applies to oral testimony, not to admissible, documentary evidence. In *Sanborn v. Dentler,* 97 Wash. 149, 166 P. 62 (1917), a physician's account books and the patient's medical records were not barred by the statute in an action to recover for physician's services. *See also McDonald v. McDonald,* 119 Wash. 396, 206 P. 23 (1917); *Vogt v. Hovander,* 27 Wn. App. 168, 616 P.2d 660 (1979).

Thus, Petitioner's allegations concerning her trial counsel's failure to pursue an alleged waiver of the Deadman's Statute must be resolved under Washington state law. Moreover, unlike a criminal defendant, Petitioner has an appropriate remedy under state tort law for any perceived deficiencies in her trial counsel's representation. *Mekdeci By And Through Mekdeci v. Merrell National Laboratories*, 711 F.2d 1510, 1523 (11th Cir. 1983) and the cases cited therein.

IV. CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Court to deny the Petition for Writ of Certiorari to the Washington Court of Appeals.

RESPECTFULLY SUBMITTED this 30th day of January, 1987.

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